Supreme Court, U.S.
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No. 95-972

In The
Supreme Court of the United States

October Term, 1995

ROSE ANN ROTHENBUSCH,
Petitioner

v.

FORD MOTOR COMPANY,
Respondent

On Petition For Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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14 pp

QUESTIONS PRESENTED

I. IS THE PLAINTIFF IN A CO-WORKER HOSTILE ENVIRONMENT HARASSMENT CASE REQUIRED TO PROVE THE DISCRIMINATORY INTENT OF HER EMPLOYER, INSTEAD OF THE CO-WORKER HARASSER, IN ORDER TO HOLD THE EMPLOYER LIABLE FOR FAILING TO END THE HARASSMENT?

II. DID PETITIONER SATISFY RULE 51 BY RAISING TIMELY OBJECTIONS TO THE JURY INSTRUCTIONS AT ISSUE IN THE PETITION FOR WRIT OF CERTIORARI?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

REASONS FOR GRANTING THE WRIT 1

I. IS THE PLAINTIFF IN A CO-WORKER HOSTILE ENVIRONMENT HARASSMENT CASE REQUIRED TO PROVE THE DISCRIMINATORY INTENT OF HER EMPLOYER, INSTEAD OF THE CO-WORKER HARASSER, IN ORDER TO HOLD THE EMPLOYER LIABLE FOR FAILING TO END THE HARASSMENT? 1

II. DID PETITIONER SATISFY RULE 51 BY RAISING A TIMELY OBJECTIONS TO THE JURY INSTRUCTIONS AT ISSUE IN THE PETITION FOR WRIT OF CERTIORARI? 2

A. Petitioner raised her objection to the "personal animosity" jury instruction because it ignored the effect of the conduct on the victim 2

B. Petitioner objected to the "personal animosity" jury instruction and the subsequent clarification because neither allowed the jury to consider that the harasser was motivated by both personal animosity and Petitioner's sex 6

C. Petitioner objected to the "comparable non-protected persons" jury instruction during the charge conference . . . 8

CONCLUSION 9

TABLE OF AUTHORITIES

CASES

Burns v. McGregor Elec. Indus., Inc., 989 F.2d 959 (8th Cir. 1993) 2

Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991) 2

Mitchell v. Toledo Hospital, 964 F.2d 577 (6th Cir.1992) 8

Pierce v. Commonwealth Life Insurance Co., 40 F.3d 796 (6th CIr. 1994) 8

Rothenbusch v. Ford Motor Co., No. 9303945 (6th Cir. Jul. 20, 1995) 5

OTHER AUTHORITIES

EEOC Guidelines on Discrimination Because of Sex, 29 U.S.C. § 1604.11(d) 1

Fed: R. Civ. P. 51 5

REASONS FOR GRANTING THE WRIT

Petitioner respectfully submits this Reply Brief to address issues Respondent raised in its Brief in Opposition. These are issues that Respondent has never raised before throughout the long history of this case.

I. IS THE PLAINTIFF IN A CO-WORKER HOSTILE ENVIRONMENT HARASSMENT CASE REQUIRED TO PROVE THE DISCRIMINATORY INTENT OF HER EMPLOYER, INSTEAD OF THE CO-WORKER HARASSER, IN ORDER TO HOLD THE EMPLOYER LIABLE FOR FAILING TO END THE HARASSMENT?

Respondent suggested in its Brief in Opposition that the discriminatory intent of the employer is the important consideration in hostile environment harassment cases, and that the intent of the co-worker harasser is irrelevant. Petitioner suggests that if this argument has any merit, it presents another reason for this Court to review this case and clarify the elements of a hostile environment harassment claim, especially when the harasser is a co-worker and not a supervisor of the target of the harassment.

The EEOC Guidelines on Discrimination Because of Sex suggest that an employer is liable for co-worker sexual harassment where "the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action." 29 C.F.R. § 1604.11(d). No mention of the employer's discriminatory intent in

failing to take appropriate corrective action is made.

Petitioner has been unable to find any hostile environment harassment cases involving co-workers in which the employer was relieved of liability because it did not intentionally discriminate against the plaintiff when it failed to take action regarding her complaints of harassment. On the contrary, in those cases where the employer was held liable, no plaintiff was required to establish the discriminatory intent of her employer in preventing or failing to stop the harassment of a co-worker. See, e.g., Burns v. McGregor Elec. Indus., Inc., 989 F.2d 959 (8th Cir. 1993); Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991).

Respondent's argument reflects the confusion that surrounds the jurisprudence of hostile environment harassment under Title VII. Therefore, Petitioner respectfully requests this Court to review the decisions of the courts below and determine whether a hostile environment plaintiff must prove intentional discrimination, and if so, whether it is the employer's intent or the co-worker harasser's intent that must be proved.

II. DID PETITIONER SATISFY RULE 51 BY RAISING A TIMELY OBJECTIONS TO THE JURY INSTRUCTIONS AT ISSUE IN THE PETITION FOR WRIT OF CERTIORARI?

A. Petitioner raised her objection to the "personal animosity" jury instruction because it ignored the effect of the conduct on the victim

Petitioner raised her first objection to the "personal animosity" jury instruction during the charge conference. Both the Respondent and the Sixth Circuit relied on only a small portion of the discussion during the charge conference to support the contention that Petitioner did not object to the instruction. Petitioner's entire statement of her objection was:

> I think it is a very significant instruction, Your Honor. I don't have any problem with the statement "the personal animosity is not the equivalent of sexual harassment as prescribed by law", in that general concept. What I have a problem with is the last phrase of the first sentence, that "she would not have been the object of harassment but for the fact of her sex." I don't think that the -- I think there can still be sexual harassment without the motivating factor being her sex if, in fact how you harass someone is sexually offensive. In other words, if -- well, I guess I would propose "but for the fact of her sex, she would not have been subjected to the type of harassment that she complains of," or something to that effect.

After additional discussion regarding the language of the charge, and the court's decision to give the instruction as proposed by Respondent, with only minor changes, Petitioner objected once more: "I object to the end result here anyway."

Petitioner objected again during the conference considering the trial court's answer to the jury question

regarding this instruction, noting that the jury seemed to be confused by the "personal animosity" reference in the instruction:

> Your Honor, the plaintiff objected to this charge in the first place. We would propose . . . that neither of the two possible interpretations given by the jury to the definition of "equivalent," neither of those are the answer . . . . I think that's [sic] what we're getting at in this entire jury instruction is whether the claimed unlawful harassment in this case, the posters, those sexually offensive posters, were they designed or were they done in such a way because of her sex, female, if she were a male, would the posters have been of the same variety . . . .

A little later during the same discussion, Respondent argued that the motive of the harassment was the key to interpreting the "because of sex" requirement:

> [T]he legal issue . . . is what is the intent of the activity. Is the intent because it's a manifestation of personal animosity or is the intent because it's a manifestation of some sexual motive which is prohibited by law? Harassment is not the key word. That's action. The question is what's the motive? If it's harassment because you don't like somebody, that's not prescribed [sic] by law. If it's harassment because of their sex, that, then, is prescribed [sic] by law.

Petitioner then further explained her position:

> Let me give you an example that I think brings it right home. . . . If I don't like my neighbor, I just hate him because he will not let me use his volleyball net in his back yard, I have a personal animosity toward him, and to show that personal animosity, I then go and burn a cross on his front lawn because he happens to be black. I suggest to you that would be racial harassment despite the fact that [I was motivated by] my personal animosity because he won't . . . let me use his volleyball net . . . . Just like in this case it's sexual harassment because even though Mr. Meyer may have done this because he hated Rose Ann Rothenbusch's guts, he would not have -- the way he did it is based on sex because of how sexually offensive the material is and I think the racial harassment example is exactly analogous.

On appeal to the Sixth Circuit, Petitioner argued that both the instruction and the subsequent clarification from the court were in error. The Sixth Circuit ruled on this jury instruction directly, thus acknowledging that the issue was properly before it and had not been waived. Rothenbusch v. Ford Motor Co., No. 9303945 at 6-8 (6th Cir. Jul. 20, 1995).

Fed. R. Civ. P. 51 requires that, to preserve an issue regarding jury instructions for appeal, a party must object to the instruction before the jury retires, and must state "distinctly the matter objected to and the grounds for

the objection." Petitioner satisfied the requirements of Rule 51 during the charge conference, and again when discussing the court's answer to the jury's questions. Moreover, Petitioner subsequently raised the issue on appeal to the Sixth Circuit. Therefore, Petitioner has properly preserved the issue for review by this Court.

B. Petitioner objected to the "personal animosity" jury instruction and the subsequent clarification because neither allowed the jury to consider that the harasser was motivated by both personal animosity and Petitioner's sex

Although Petitioner did not state the objection using the term "mixed motives," the discussions during the charge conference and the later conference considering the jury question clearly revolved around the two potential motives for the harassment, personal animosity and Petitioner's sex, and therefore was a mixed motives argument. Petitioner's statement that "there can still be sexual harassment without the motivating factor being her sex if, in fact, how you harass someone is sexually offensive" was her explanation of how a harasser can be motivated by more than one reason.

When the court proposed that the jury's question be answered with, "[a]ct[s] of personal animosity in and of themselves are not sexual harassment but harassment must be because of sex. Please review the entire charge, including page 18," plaintiff objected once more:

> See, Your Honor . . . the problem I have with that is that "the acts of personal

> animosity in and of themselves" . . . I think the first sentence would suggest to the jury that if the acts were motivated by personal animosity, that it would not be unlawful sexual harassment. I think what we need to focus on is what acts did he commit and what nature were they and would he have directed those at a male . . . .

In this case, the Petitioner argued throughout the charge conference and the conference considering the jury question that the harasser was motivated by at least two reasons: 1) personal animosity and 2) the choice of sexually graphic harassment because of its peculiar power to wound the intended victim because of her sex. Because only one of these motives is prohibited by Title VII, this is a classic mixed motives argument.

Petitioner also argued in her brief to the Sixth Circuit that the instruction constituted error because it failed to allow the jury to consider that both motives were present. The Sixth Circuit, without much elaboration, found the jury instruction to be proper.

Petitioner satisfied the requirements of Rule 51 by objecting to the proposed jury instruction during the charge conference and the subsequent conference discussing the jury question. Moreover, Petitioner subsequently raised the issue on appeal to the Sixth Circuit. Therefore, Petitioner has properly preserved the issue for review by this Court.

C. Petitioner objected to the "comparable non-protected persons" jury instruction during the charge conference

Petitioner raised an objection to the "comparable non-protected persons" jury instruction during the charge conference, suggesting that the court add the phrase "of comparable seriousness" after the existing phrase "engaged in the same or similar conduct." Petitioner also argued in her brief to the Sixth Circuit that "Plaintiff did not need to establish that the similarly situated employees engaged in the identical conduct (i.e., assault with mace as opposed to a walkie-talkie), only that they engaged in the same or substantially similar conduct of equal seriousness."

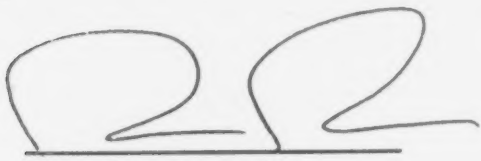
In both instances, Petitioner argued that the Mitchell test was overly harsh and restrictive. Mitchell v. Toledo Hospital, 964 F.2d 577 (6th Cir. 1992). Petitioner did not cite to the Pierce opinion because it had not yet been decided. Pierce v. Commonwealth Life Insurance Co., 40 F.3d 796 (6th Cir. 1994).

Furthermore, Petitioner also objected to the district court's exclusion of evidence of other similarly situated employees because they were not similar enough to the Petitioner under the Mitchell test. She also raised this argument in her motion for a new trial and in her brief to the Sixth Circuit. Therefore, Petitioner has properly preserved the issue for review by this Court.

CONCLUSION

For the foregoing reasons and the reasons set forth in the Petition for Writ of Certiorari, Petitioner respectfully requests that this Writ of Certiorari be granted.

Respectfully submitted,



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